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No. 95 - 974 (16)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Writ Of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF FLA-187 COMMITTEE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The **FLA-187 Committee, Inc.**, located in Boca Raton, Florida, and founded in April, 1995, is a non-profit corporation engaged in grassroots political activity in the State of Florida. The Committee registered as a "political committee," and in May, 1995, filed four proposed amendments to Florida's Constitution with the Secretary of State. One of the amendments bears the title "Governmental Implementation and Utilization of Official English," and by its express terms will amend Article II, Section 9 of the state constitution. Distribution of the amendment petitions began in mid-1995, and literally hundreds of grassroots volunteers have collected thousands of signatures from Florida's registered voters as of this date. The FLA-187 Committee believes that the Ninth Circuit Court of Appeals' ruling in the instant matter, if not reviewed by this tribunal, will have a chilling effect on political activists throughout the nation who are utilizing the initiative and referendum process to implement or strengthen their state's "Official English" laws. *All parties have consented to the filing of this Brief.*

Citizens of Dade United ("CODU"), a non-profit corporation based in Miami, Florida, is also engaged in grassroots political activity in the State of Florida. Incorporated in 1980, CODU was instrumental in distributing and collecting a sizable number of the more than 300,000 petition signatures needed to place the original "Official English Amendment" on Florida's General Election Ballot in 1988; members also devoted thousands of hours to the passage of the amendment, now codified as Article II, Section 9, of the Florida Constitution. CODU's membership provided guidance in the 1995 drafting of the proposed FLA-187 amendment relating to "Official English," and has assisted in the collection of petitions relating to said amendment.

The **California Coalition for Immigration Reform** ("CCIR"), headquartered in Huntington Beach, California, is an incorporated grassroots political organization which serves as an umbrella organization for some 24 grassroots groups in 5 states which are concerned with the influx of legal and illegal immigrants into the western United States, and with the assimilation of new arrivals into the American mainstream. CCIR was a sponsoring organization of California's Proposition 187 in 1994, and is currently in the process of drafting a citizen's initiative similar in scope and effect to Arizona Constitution Article XXVIII, the subject of the instant case. CCIR is cognizant of California's presence within the Ninth Circuit's jurisdiction, and seeks review of this decision in view of its direct impact on all grassroots activists living in states on the West Coast.

The **Freedom Forum** ("Forum") is an unincorporated association based in Montgomery, Alabama, serving as an umbrella organization for grassroots political groups within Alabama. The Forum has conducted research into the growing non-English speaking population within the state, and has commenced with the drafting of legislation for consideration by state legislators. The Forum is concerned that the Ninth Circuit's decision in *Yniguez* will have a substantially negative impact on proposed legislative or constitutional revisions relating to Official English.

SUMMARY OF ARGUMENT

The *amici curiae* supporting the Petitioners are all grassroots political organizations with a deep concern for the nationwide impact of the ruling by the Ninth Circuit Court of Appeals in *Yniguez*.

The *amici* have set forth the historical context for the utilization of the initiative process in the United States. The dynamic level of growth in its use, and event the support for a national initiative, underscore the initiative process' critical place on the modern political landscape.

The district court and court of appeals issued rulings in *Yniguez* setting forth new modes of First Amendment doctrinal analysis, based upon ethereal constitutional underpinnings. Grassroots political activists around the nation are seeking protection for their efforts from federal judges who desire to substitute their judgment for that of "the people" in the political arena.

The *amici* further assert that the appropriate mechanism for addressing tensions between cultural pluralism and efforts to maintain assimilation is the legislative process. In view of the dangers of cultural apartheid and the enormous costs attendant to non-assimilation, the states and the federal government should be afforded substantial flexibility in this area.

LEGAL ARGUMENT

I. THE POWERS RESERVED TO THE PEOPLE SHOULD NOT BE ABROGATED BY THE UNWARRANTED EXPANSION OF CONSTITUTIONAL DOCTRINE

It is beyond dispute that the latter portion of the 20th Century has brought rapid and far-sweeping changes to the sociopolitical landscape of the United States. It has been suggested that notions of "economic insecurity" or "unhappiness with big government" are the root causes of the disquietude within the American populace. Michael Sandal, "America's Search for a New Public Philosophy," *Atlantic Monthly*, at 57 (March, 1996).

> The problem, though, runs deeper than these diagnoses suggest; it concerns the public philosophy by which we live and the conception of citizenship that informs our political debates. American politics has lost its civic voice. Despite their disagreements, liberals and conservatives share an impoverished vision of citizenship, leaving them unable to address the anxiety and frustration abroad in the land.

Id. This perceived loss by Americans, of their "civic voice," has engendered the type of activism exemplified by the passage of the state constitutional provision at issue in the instant appeal.

The matter *sub judice* touches directly upon Article XXVIII of the Arizona Constitution, but casts an indirect shadow over the efforts of hundreds of thousands of grassroots political activists, past and present, who have

participated in majoritarian democracy at its most basic level. The majority opinion of the *Yniguez* tribunal, particularly its creation of several new First Amendment litmus tests which interfere with state governmental operations, has a potentially far-reaching effect at every level of the political process, and a reversal of the Ninth Circuit court's decision in *Yniguez* by this court is fully warranted.

A. Historical Context: Participatory Democracy

The "people" and the "states" are the repository of all powers not specifically delegated to the United States. U.S. Constitution, amend. X ; 2 J. Story, *Commentaries on the Constitution of the United States* 652 (5th ed. 1891). The "right of the people" to communicate with the government directly and to engage in direct democratic action is constitutionally safeguarded by the First Amendment's prohibition against the enactment of any law abridging the right "to petition the [g]overnment for a redress of grievances." U.S. Constitution, amend. I.

From the same analytical wellspring from which the right to petition arose came the direct participation of the citizenry in constitutional conventions and in the ratification process during this nation's founding period. T. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 12-20 (1989). Beginning in the latter 19th century, some two dozen states have adopted the Swiss-style constitutional initiative mechanism, and variations are highly popular throughout the U.S. today. Collins and Oesterle, *Structuring the Ballot Initiative*, 66 U. Colo. L. Rev. 47, 54 (1995).

Through the enactment of measures providing for a system of initiative and/or referendum, the electorate obtains the means to directly propose laws or amendments to a state's constitution. *See, e.g.*, Ariz. Const. art. XXI; Fla. Const. art. 11, sec. 3. It was intended that the initiative process would empower "the people," indeed, that the initiative would serve as "a way around monied influence on elected representatives ... would thrust from power the Captains of Greed." Collins, *supra p. 5*, at 56. In view of the chronic lack of financing suffered by the grassroots organizations which typically advance initiative campaigns, the enormous petition-drives necessary to gather signatures for ballot access, and the typical presence of unpaid grassroots volunteers rather than paid political operatives in most campaign positions, it is not unrealistic to characterize these campaigns as the quintessence of participatory democracy.

B. Modern Participatory Democracy and Review by the Federal Judiciary

A dynamic grassroots effort is essential in most modern initiative campaigns; this characterization would fit not only petitioner Arizonans for Official English's 1988 Campaign for Proposition 106 (now codified as Article XXVIII), but the 1994 California Proposition 187 campaign by *amicus* C.C.I.R. and *amicus* FLA-187 Committee's current Official English campaign, in addition to numerous other grassroots citizen-based initiative drives over the past decade. *See, e.g.*, Carson, *209,154 Signatures are Filed for 'English Only' Initiative*, Arizona Daily Star, July 8, 1988, at 1B, col. 1; *see generally* Peter Brimelow, *Alien Nation* 152 (1995).

The thirst for an increase in direct democratic participation has grown throughout this century; in 1988 California voters received explanatory pamphlets on proposed state, county and local amendments, initiatives and laws. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1508-09 (1990). Further, two-thirds of persons questioned in a 1983 Gallup survey indicated support for direct citizen-review of state and local laws, while polls conducted in 1978, 1981, and 1987 all supported a constitutional amendment for a national initiative by a more than two-to-one margin. *Id.* at 1507 n. 16.

This Court should provide guidance to lower federal courts, and should admonish them to exercise exceptional care during the review of a citizen-based initiative; those initiatives that bear a reasonable relationship to traditional state objectives, and which do not trample well-settled individual liberties, should be shielded from judicial whim.

As noted by Chief [then Associate] Justice Rehnquist, "[i]f we do not likewise contain the courts, in some way, from negating a law that, although unwise in the eyes of some, is nonetheless rendered unconstitutional only by a considerable stretch of judicial imagination, we risk a repetition of what one of my predecessors on the Supreme Court referred to as 'Judicial Supremacy.'" W. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34. Vand. L. Rev. 249, 263 (1981). As noted by Professor Eule, "[a] nation that traces power to the people's will does not easily digest the practice of unelected and unaccountable judges denying the populace what most of them appear to want." Eule, *supra*, at 1504.

This Court has acknowledged that state laws which provide for initiative and referendum "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. 137, 141 (1971). "Under our constitutional assumptions, all power derives from the people ... [and] the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976) (Burger, C.J.) (citations omitted).

It has been noted that, abstract theories of sovereignty and democracy aside, "[a] judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted." Eule, *supra* p. 7, 99 Yale L.J. at 1506. Just such a perception has arisen in Arizona because of the *Yniguez* decisions, in California because of the trial court's decision in *LULAC v. Wilson*, No. CV 94 - 7569 MRP (C.D. Cal. Nov. 20, 1995) [Proposition 187 decision], and elsewhere in the nation. We would do well to recall the Declaration of Independence's assertion that governments derive "their just powers from the consent of the governed."

C. Participatory Democracy and the *Yniguez* Rulings

The review by federal courts of an "Official English" measure, as well as other enactments passed through initiative and referendum efforts, invariably will follow a grueling campaign where the issue is thoroughly debated on all sides. *See generally* Rosalie Pedalino Porter, *Forked Tongue: The Politics of Bilingual Education* 207-13 (1990).

The campaign engaged in by the Arizonans for Official English ("A.O.E.") in the 1988 Arizona Proposition 106 campaign was no exception. A.O.E., its supporters and grassroots volunteers, were required to obtain by initiative petition the signatures of "a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for Governor at the last preceding general election." Ariz. Const. art. XXI. sec. 1, or 130,048 valid signatures. Carson, *209,154 Signatures are Filed for 'English Only' Initiative*, Arizona Daily Star, July 8, 1988, at 1B, col. 1.

This collection effort by hundreds of volunteers and paid signature gatherers over many months was followed by an arduous election campaign. *See* Hall, *Proposition 106 Supported by Most Voters*, Arizona Republic, October 30, 1988, at B1, col. 1: Astle, *It's Still English, Officially Speaking*, Prescott Sun, November 11, 1988, at 1. The issue was debated throughout the state, on a topic of national political significance: the creation of incentives for immigrants to assimilate rapidly, and prevent the estrangement of linguistic groups, so familiar to those who have studied Belgium, Africa, Canada, China, the Balkans and other bilingual or multilingual areas. *See, e.g.*, Peter Brimelow, *Alien Nation* 193-95 (1995).

Following the expression of the political will of the people of Arizona in the November, 1988 election, a state employee, Ms. Yniguez, immediately filed suit in federal court alleging deprivation of constitutionally-protected rights, including abridgment of her freedom of speech.

The trial court, in its 1990 ruling on the constitutional claim, did not even acknowledge that the electoral expression of "the people's will" was to be subordinated to the First Amendment claim advanced by plaintiff Yniguez; indeed, except for bare mention of the general election, the direct participation of Arizona's citizenry in this matter goes unmentioned. *See Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990).

At the appellate level, in deciding that Article XXVIII was facially overbroad, Circuit Judge Reinhardt's majority opinion delineates several new constitutional doctrines, including the assertion that the regulation of choice of language by the state for public employees is tantamount to regulation of speech content. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934-36 (9th Cir. 1995). In framing additional new constitutional standards, the court opined that the individual decision of an employee or elected official regarding "best interests" will serve as the benchmark for the constitutional analysis of State-mandated public language choices, *id.* at 937, and also that the fact that speech occurs as part of the performance of a public employee's job functions is not conclusive in terms of control, but instead the State's right to control that speech must undergo a balancing test, *id.* at 940.

The *Yniguez* majority failed to distinguish this Court's recent ruling that "the government as employer has far broader powers than does the government as sovereign ... [that in] many situations ... the government must be able to restrict its employees' speech ... [and] many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill* ___U.S.____, 114 S.Ct. 1878, 1886 (1994). As noted in Judge Fernandez' *Yniguez*

dissenting opinion, this Court has held that a state, when it is the speaker, "may make content-based choices." *Yniguez*, 69 F. 3d at 957 (Fernandez, J., dissenting) *quoting Rosenberger v. Rector and Visitors of Univ. of Va.*, ____U.S.____, 115 S. Ct. 2510, 2518-19 (1995). Further, the *Rosenberger* court opined "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 115 S. Ct. at 2519, *citing Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 1773 (1991).

Grassroots political organizations working on initiative campaigns believe that the *Yniguez* majority objected to Article XXVIII on the basis of political philosophy, and in effect substituted the majority's view on multilingualism for that of the voters of Arizona. This issue is decidedly political, and neither Ms. Yniquez nor recipients of public services have a constitutional basis for deciding the mode of delivery. The *Yniguez* majority's analysis has ignored "the difference between a government employee who contributes to the marketplace of ideas and an employee who speaks in a mode which helps the members of public [in] understanding what he says." *Yniguez*, 69 F.3d at 960 (Wallace, C.J., dissenting), *citing United States v. National Treasury Employees Union*, ____U.S. _____, 115 S. Ct. 1003, 1015 (1995).

The *Yniguez* majority's failure to make this critical distinction led to the decision under review, and has engendered in the public's eye the belief that "judicial supremacy," which Judge Rehnquist cautioned against, is the root cause of this thwarting of the people's will.

II. THE STATE CONSTITUTIONAL PROVISION WHICH MANDATES THE CONDUCTING OF GOVERNMENTAL AFFAIRS IN ENGLISH IS A RATIONAL CHOICE PREDICATED UPON VALID SOCIOPOLITICAL CONSIDERATIONS

These *amici* support the Petitioners' assertion that Arizona's "choice of language" is in furtherance of a legitimate state interest, and that recipients of government services have no basis to compel the state to act in other languages. *See, e.g., Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (no basis to compel governmental notices in French); *Guadalupe Organization Inc., v. Tempe Elementary School District*, 587 F.2d 1022 (9th Cir.1978) (language choice serves a legitimate state interest). Further, when the government is the "speaker" it may control the nature of information disseminated on its behalf. *Rosenberger*, _____U.S. at _____, 115 S.Ct. at 2518-19.

There are also a variety of differing views today on the "traditional American melting pot" which cause concern over our nation's ability to remain a cohesive political unit. The state and federal governments are not forbidden from utilizing public employment to effect the functioning of society. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n.4 (1990).

A. Assimilation into the American Polity is an Issue Which Should be Resolved Within the Legislative Process.

As noted above, the hallowed place accorded "the traditional American melting pot" has been undermined over the past several decades. Powerful code words, such as

"diversity" and "multiculturalism," abound in the ongoing debate. "[I]n the United States, competing tensions exist between the impulse toward maintaining cultural pluralism and the efforts to hasten assimilation." Rosalie Pedalino Porter, *Forked Tongue: The Politics of Bilingual Education* 94 (1990).

An appropriate resolution of this issue is of immense political import, as our Canadian neighbors have learned. Torriero, *Close Call: Canada Stays United - Quebec Separatists Lose by Less than 1 %*, [Ft. Lauderdale] Sun Sentinel, October 31, 1995, at 1A, col. 2; *Prime Minister Struggles to Keep Canada Together*, Sun Sentinel, October 25, 1995, at 8A, col.2. The instant litigation, involving a measured approach in a nation of some 300 - plus languages, attracted national attention after the 1990 ruling at the trial level.

> The Arizona law, however, was meant to address the issue of national cohesion at the level of politics. The problem is real. America has experienced waves of immigration in the past. What is new today is a political program of de-assimilation: the assertion that newcomers have nothing to learn about the society they wish to join - that the necessity of learning is, in fact, an infringement of their rights.
>
> The practical effects of such aggressive parochialism would be cultural apartheid. That doesn't bother the operators who insist that Spanish or oriental languages be given parity with English. A balkanized America would give them built-in political leverage.

The Balkans, U.S.A., National Review, March 5, 1990, at 19, col.2.

Linguistic unity is a valid concern at every level of government in this nation. First, the failure of groups and/or individuals to assimilate into the American cultural mainstream presages linguistic and cultural isolation, Peter Brimelow, *supra* p.9, at 8. This isolation directly fuels the desire for geopolitical separatism. *See* Chavez, *One Nation, One Common Language*, The Failure of Bilingual Education 9 (1990) (at 1995 National Association for Bilingual Education Conference speakers challenged notion of U.S. sovereignty and asserted Southwest and northern Mexico form one cultural region, *La Frontera*); Brimelow, *supra* p.9 , at 125 (citing Eritrea, Malaysia, Czechoslovakia, Soviet Union, Yugoslavia, Lebanon and others).

Second, there are massive financial costs attendant to non-assimilation. An analogy to the rise in those costs, as we draw immigrants seeking social services from increasingly diverse regions and accompanying linguistic dissimilitude, may be drawn with the growth in expenditures for bilingual education. Commencing in the late 1960's, bilingual education started as a $7.5 **Million** program aiding Mexican-American children until they acquired sufficient English fluency. Chavez, *supra*, at 9. Current estimates place the 1993-1994 costs of programs for limited-English proficient students at over $12 **Billion** in State and Federal funds. Youngblood, *The Cost of Bilingual Education in the U.S.: A Review of the ALEC Report*, READ Perspectives 39-41 (Fall, 1995).

In Dade County, Florida, the total cost of Bilingual programs during the 1980-81 school year was $10,193,884 (Dade County School Board 1981-82 Recommended Budget); as of the 1993-94 year costs had skyrocketed to $78,020,000, and projected costs for 1995-96 are $97,850,000 (Dade County School Board 1995-96 Budget).

The efforts of Arizona's citizens, and any governmental entity in this nation, to forestall ***linguistic and cultural apartheid***, and to preclude the hemorrhaging of the public fisc by encouraging assimilation in a reasonable fashion, should remain within the legislative realm and should not be subject to creative constitutional analysis by federal judges with contrary political viewpoints.

B. The American Public Favors Official English as a Response to this National Dilemmma

As our nation has welcomed a more diverse influx over the past three decades, since the 1965 Immigration Act, support for the formal establishment of English as the official language has crystallized. In an August, 1995 poll, asking "Do you think English should be made the official language of the United States," 86% of Americans were in agreement. *U.S. English/Luntz Survey*, READ Perspectives 49 (Spring 1996). 80% of self-described liberals and 91% of self-described conservatives were in favor of the designation, as well as 86% of African-Americans and 78% of all non-white Americans. *Id.*

The decisions below in the instant case have interjected newly-created First Amendment doctrinal analysis into this critically sensitive sociopolitical issue. This is an issue upon which the future viability of this nation, now encompassing over ***300 languages***, may rest.

As noted in the Petitioners' brief, "[w]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309 (1981), *quoting Kennedy v. Mendoza-Martinez*, 372 U.S.

144, 160 (1963). As noted in a piece commenting on the decision of the initial three-judge panel of the Ninth Circuit Court of Appeals, "[i]t is absurd to maintain that our fundamental organic law mandates passivity in the face of progressive linguistic Balkanization." National Review, January 23, 1995, at 12, col.2. "As Justice Jackson said long ago, the U.S. Constitution is not a suicide pact. 'And that applies to national suicide, too." *Id.*; *see also Open Letter from National Review Editors, re: National Suicide*, National Review, November 6, 1995, (reviewing October, 1995 *en banc* decision).

CONCLUSION

For the reasons stated, the Court should reverse the decision of the Ninth Circuit Court of Appeals; find that Article XXVIII of the Arizona Constitution is not violative of the First Amendment, and grant such additional relief as is necessary to implement this Court's decision.

Respectfully submitted,

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